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IN THE

Supreme Court of the United States

October Term, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ and JUDAH I. LABOVITZ,

Petitioners,

against

THE STATE OF NEW YORK, MARIO CUOMO, and JAMES WETZLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(3080—LC9-789—1993)

Counterstatement of Questions Presented

1. Whether, in view of the long and unbroken line of decisions indicating that a state may rely on property not itself taxable by the state in determining the rate of taxation to be applied to a nonresident's property within its jurisdiction, this Court should grant certiorari in order to review a decision of the New York State Court of Appeals reaffirming that principle.

2. Whether, having concluded in 1981 that permitting nonresidents with income in a given state to claim income tax deductions and exemptions only in the same proportion to the total available deductions and exemptions that their income within the state bears to their total income is not discriminatory and does not violate the Article IV privileges and immunities clause, this Court should grant certiorari in order to reexamine that conclusion.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

Respondents State of New York, Mario Cuomo and James Wetzler respectfully request that the Court deny the petition

for a writ of certiorari seeking review of the decision of the Court of Appeals of the State of New York.

Statement of the Case

Between 1919 and 1987, the New York State income tax of a nonresident was calculated by using a tax rate based only on that part of the nonresident's income derived from New York sources, regardless of the nonresident's total income. Thus, for example, in 1987, a nonresident taxpayer with non-New York income of $270,000 and New York income of $30,000 would have had to pay $1,788 in New York taxes. A nonresident whose total income consisted of $30,000 derived entirely from New York sources would have had to pay the same amount, even though he earned one-tenth as much. And because New York residents are liable for state tax on all their income regardless of its source, a resident with the same $270,000 non-New York and $30,000 New York income would in 1987 have owed tax of $26,054.

Since January 1, 1988, the effective date of the New York Tax Reform and Reduction Act ("TRARA"), the income of nonresidents from all sources has been used in calculating the tax on nonresidents' income derived from sources in New York State. Both before and after the passage of TRARA, nonresidents were liable for New York tax only on their income "derived from or connected with New York sources." N.Y. Tax L. § 631(a). Under TRARA, however, non-New York income is taken into account in determining the tax rate for a nonresident. A non-resident taxpayer now calculates his New York tax by initially computing it as if he "were a resident," and then multiplying the tax a resident would owe on the nonresident's total income "by a fraction,

the numerator of which is [his] New York source income . . . and the denominator of which is [his] federal adjusted gross income." N.Y. Tax L. § 601(e). This process of reducing the nonresident's tax by using the ratio of New York income to total income is called "apportionment."

Thus, to compute his New York tax under TRARA, a nonresident starts with his Federal Adjusted Gross Income—essentially, that is, his total income from all sources. From this figure he subtracts the applicable deductions and exemptions to determine what his taxable income would be if he were a resident. The tax on this amount is called the "tax base," and is what a New York resident with the same total income as the nonresident would pay in New York tax. The nonresident, however, reduces this figure by multiplying it by the proportion of his New York income to his total income. Thus, for example, a nonresident with $75,000 of New York income and $25,000 of non-New York income would pay as New York tax 75% of his tax base.

TRARA, in other words, does not provide for taxation of the non-New York income of nonresidents. Rather, this income, both earned and unearned, is added to nonresidents' New York income to calculate their tax base *as if* they were New York residents. The fact that New York cannot and does not tax the non-New York income of nonresidents is then reintroduced to the calculation by applying the apportionment figure to produce a final tax. The overall effect, in a progressive tax system such as New York's, is to increase the marginal tax rate on the New York income of nonresidents. Their non-New York income is *considered* in the course of this calculation, but it is not taxed.

TRARA also addressed itself to joint tax filings by married couples. "If the federal income tax liabilities of husband and wife . . . are determined on a joint federal return, they shall file a joint New York income tax return, and their tax liabilities shall be joint and several . . . ." N.Y. Tax L. § 651(b)(2). This provision applies equally to nonresident and resident married coupies.

On March 23, 1989, plaintiffs Lawrence J. Brady and Barbara A. Brady commenced this action in the New York State Supreme Court. They alleged that they were married residents of New Jersey, with Mr. Brady employed in New York and Mrs. Brady in New Jersey. The complaint named as defendants the State of New York, its Governor, and its Commissioner of Taxation and Finance. The Bradys alleged that Tax Law § 601(e) violates the due process and Article IV privileges and immunities clauses of the United State Constitution "by, in effect, imposing a rate of tax which is derived in substantial part from income from non-New York sources." They further claimed that the joint filing requirement imposed by § 651(b)(2) violated their constitutional rights by, *inter alia*, attempting "to exercise extraterritorial authority" over nonresident spouses. Their amended complaint, which added as plaintiffs Deborah R. Labovitz and Judah I. Labovitz, identified as a married couple residing in Pennsylvania, reiterated these claims.

Both sides moved for summary judgment. By decision dated July 9, 1990, the State Supreme Court granted defendants' motion in its entirety. Plaintiffs then appealed to the Appellate Division, Third Department. In a decision issued November 27, 1991, that court declared the joint filing requirement unconstitutional "as applied to require the filing of a joint income tax return by a nonresident solely

because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return," but otherwise affirmed the judgment of the lower court. The Appellate Division found the apportionment methodology set forth in § 601(e) "a valid means, under due process, of using income not itself taxable as part of the measurement of the tax imposed on the nonresident's New York income." (21a)[1] Similarly, the court held that the apportionment methodology did not discriminate against nonresident taxpayers and thus entailed no violation of the privileges and immunities clause, for "[r]esident and nonresident taxpayers similarly situated in terms of ability to pay taxes out of all sources of income are treated the same within the parameters of New York's progressive income taxation system."[2] (22a)

The Appellate Division subsequently granted plaintiffs' motion for leave to appeal to the New York Court of Appeals, which on December 22, 1992 issued a decision wholly rejecting plaintiffs' constitutional challenges to New York's method of calculating nonresidents' income tax. It held that New York's method of taxation does not violate the Constitution "so long as the rates are applied, as here, in a nondiscriminatory manner and only to taxable New York income." (10a)

The court first considered what it characterized as plaintiffs "claim that by setting tax rates with reference to [federal] adjusted gross income, New York taxes non-New York income, thus taking property in violation of due process."

[1]Parenthetical citations followed by "a" are to the Appendix to the Petition herein.

[2]The joint filing requirement was not at issue in the Court of Appeals.

(6a) Relying on an unbroken line of cases in this Court and the high courts of other states, the Court of Appeals noted that "[i]t has long been the rule that states may refer to non-taxable out-of-state assets in setting their rates for taxable assets." (7a) As in these prior cases, the court distinguished between a permissible "tax on in-state income, which is within the jurisdiction of the state," even when the rate of taxation of that income is determined in part by out-of-state income, and an unconstitutional tax on nonresidents' out-of-state income. Because, as this Court has held, "[w]hen the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed," the Court of Appeals upheld the apportionment methodology. (7a-9a, *quoting Maxwell v. Bugbee*, 250 U.S. 525, 539 [1919]) Nor, said the court, does the fact that New York considers, in setting the tax rate for married nonresidents, the joint income of nonresidents who have filed joint federal returns, call for a different result. (7a-9a)

The Court of Appeals also rejected plaintiffs' privileges and immunities argument, noting that, to prevail, "plaintiffs must demonstrate disadvantage as against others in a similar position." (10a) This, said the court, plaintiffs could not do, for they are "similarly situated" to New York taxpayers "with the same total income" as plaintiffs. (10a) Because identical rates of taxation are applied to residents and nonresidents with the same total income, there is no discrimination against nonresidents and thus no constitutional violation. (10a)

REASONS FOR DENYING THE WRIT

I.

It is clear from a long, unbroken, and still-vital line of cases that New York's taxation of a nonresident's income at a rate determined by his total income comports with the due process clause.

Far from being, as petitioners (Petition, p. 8) style them, "unresolved," the issues raised by this litigation have been fully and consistently settled by a series of decisions in this and other courts. This Court first established more than seventy years ago that a state tax on a nonresident's property undisputedly subject to the state's taxing power and calculated at a rate determined in part by out-of-state property did not offend the due process clause. Regular judicial reexaminations of this principle have, without exception, affirmed it. There is no reason to grant the petition in this case merely to state the same principle yet again.

Quite apart from their misreading of the applicable case law, a false premise underlies petitioners' entire argument. They contend (Petition, p. 10) that "the challenged statute in effect taxes income earned outside the State." It is true that, with a progressive system of taxation like New York's, a state's reliance on property not itself taxable to determine the rate to be applied to taxable property will result in payment of more tax. But this is not the same as imposing a tax on the non-taxable property itself. Nor is this an abstruse or attenuated distinction. This Court long ago had no difficulty in detecting and explaining the difference between a permissible state tax in which "the property without the

State" bears on "the tax imposed in respect of the property within" only insofar as it "affect[s] the rate of tax" and an impermissible attempt "to compute the tax in respect of the part within the State on the value of the whole." *Frick v. Pennsylvania*, 268 U.S. 473, 496 (1924).

This distinction is reflected in the mathematics of the tax at issue in this case. A New Jersey resident with $40,000 of taxable New York income and $40,000 of non-New York income will pay $3,132 in New York tax: that is the tax on $40,000 calculated *at the rate payable* by a taxpayer with $80,000 of New York income.[3] This is more, to be sure, than the tax paid by a New Jersey resident whose $40,000 New York income is also his entire income. But the same taxpayer, if his entire $80,000 income is in fact earned in New York, will owe $6,264 in New York tax. This demonstrates that the difference between New York's methodology and actually taxing non-New York income is not, as petitioners call it, "a myth" (Petition, p. 8), but rather a real-world, economic distinction that corresponds to the conceptual distinction long acknowledged by this Court. The reality of this distinction is what guarantees that New York's approach, like that of many states before it, survives constitutional scrutiny.

Similarly erroneous is the other basis on which petitioners ground their contention that New York's taxing methodology violates due process. According to petitioners, the approach taken by TRARA is unconstitutional because it "bears no relation to any added services or protection provided by the State." (Petition, p. 10). It is difficult to believe that petitioners truly subscribe to this argument,

[3]This illustration employs 1988 tax tables, which appeared in the Record in the court below. Illustrations taken from subsequent tax years would be similar.

which would, among other things, permit residents and nonresidents alike to prevail in constitutional litigation whenever a state raises taxes but does not increase "services or protection," or else whenever it reduces such services and protection without reducing taxes. Even on its own terms, however, the argument fails. There is simply no requirement that taxes be proportionate to the services offered by a state to its taxpayers. As this Court has noted, "[n]ot only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 n. 15 (1989); *see also*, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937). The fact that New York provides an environment in which nonresidents can acquire income is more than enough to justify imposition of a tax on that income.

The constitutionality of a state tax imposed on nonresidents at a rate determined by out-of-state income or property is further demonstrated by the fact that every one of the many courts, including this Court, to have considered the practice has found it perfectly compatible with the guarantee of due process. The question has been settled since at least 1919, when this Court decided *Maxwell v. Bugbee*, 250 U.S. 525 (1919). *Maxwell* involved a due process attack on a New Jersey inheritance tax statute that taxed the New Jersey property of a nonresident decedent in the same ratio to the tax to which the decedent's estate would be subject if the decedent were a resident as the taxable New Jersey property of the estate bore to the entire estate. In other words, as with the New York methodology now at issue, the tax in question was initially calculated "as if" the taxpayer were a resident

and then reduced to reflect the proportion of taxable (i.e., in-state) value to total value. To this Court, the validity of the tax was virtually self-evident:

> When the State levies taxes within its authority, property not itself taxable by the State may be used as a measure of the tax imposed. . . . In the present case, the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it. 250 U.S. at 539-40.

The distinction in *Maxwell* is straightforward and obvious: State taxes on nonresidents may be measured by assets outside the State as long as they are not imposed on such assets. This Court relied on the same distinction in *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), which involved a Louisiana "license tax" on in-state chain stores that was based on the number of stores owned by the taxpayer both in Louisiana and elsewhere.

Plaintiffs had argued that "the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana." 301 U.S. at 424. As in *Maxwell*, however, there was a crucial distinction between the subject of the tax and its measurement. Although the tax was calculated on the basis of a taxpayer's nationwide operation, nonetheless "[i]n legal contemplation the State does not lay a tax upon property lying beyond her borders." 301 U.S. 425.

Recognizing that *Maxwell* and *Grosjean* decades ago set forth the now-settled principles that led the courts below to the correct result in the present case, petitioners attempt to question the meaning and authority of these decisions (Petition, pp. 15-17). These efforts are unsuccessful. Petitioners first argue, on the basis of a single sentence in *Maxwell*, that the case does not mean what it appears to but rather relies on a discredited "formalistic" analysis of the tax involved in terms of a "privilege." The sentence in question—the last sentence in the passage from *Maxwell* quoted above—fails to support this reading. Throughout this passage, the contrast is between a tax on "a privilege to succeed to property which is within the jurisdiction of the State" and "a tax upon property beyond the State's jurisdiction." 250 U.S. at 539. The only reason *Maxwell* speaks of property as opposed to privilege is because the taxpayer in that case attempted exactly the same argument petitioners now essay: that the State is reaching beyond the taxable activity occurring within its borders to impose a tax on property outside its jurisdiction. *Maxwell* speaks of "privilege" because the in-state activity that made taxation possible *happens to have been a privilege*, not because of some outmoded concept of territoriality. The nature of the activity makes no difference to this Court's conclusions that there is a difference between a State's taxing property over which it has no jurisdiction

and calculating a tax in terms of the taxpayer's total property, and that only the former offends due process.

The property/privilege distinction, which according to petitioners was central to the holding in *Maxwell*, can be found nowhere in this Court's subsequent decisions. In *Frick*, for example, decided only five years later, the Court described *Maxwell* as turning on the distinction between determining the rate of tax "imposed in respect of the property within" the State partly on the basis of "the property without the State" and "comput[ing] the tax in respect of the part within the State on the value of the whole." 268 U.S. at 496.[4] Likewise, in *Grosjean*, the Court, though recognizing that it was dealing with a tax on the "privilege" of doing business in Louisiana, noted that "[i]n legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states," and that the approach to taxation adopted by Louisiana "is not in legal effect the taxation of property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state." 301 U.S. at 425. The critical distinction is not between "property" and "privilege," but between taxation permissibly imposed at a rate determined by out-of-state activity and taxation unconstitutionally exacted on out-of-state property, privilege or anything else.

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[4]The fact that, as petitioners note (Petition, p. 17), *Frick* characterized the five-to-four decision in *Maxwell* as "on the border line," 268 U.S. at 495, is hardly significant after the passage of some seven decades. Like many other principles first enunciated in closely-contested cases of this Court, the principle governing both *Maxwell* and this case has become well-established law.

Any conceivable validity petitioners' discussion of *Maxwell* might once have had is completely vitiated by this Court's action in *Wheeler v. State*, 127 Vt. 361, 249 A.2d 887, *appeal dismissed for want of a substantial federal question*, 396 U.S. 4 (1969). At issue in *Wheeler* was Vermont's taxation of the "Vermont derived income" of a New Hampshire resident exactly as New York taxes plaintiffs: by calculating tax on total income and then apportioning the tax according to the ratio of in-state to total income. The Vermont Supreme Court rejected the plaintiff's due process argument, substantially identical to that of the present plaintiffs, that "since the addition of New Hampshire income increases the tax, it must be New Hampshire income that is being taxed." 249 A.2d at 890. The court disagreed: "What is happening is that Vermont income is being taxed at an increased rate, and nothing more." *Id.* This Court's dismissal of the appeal in *Wheeler* for want of a substantial federal question was, in effect, a decision on the merits, indicating its view that the judgment appealed from was correct as to the federal questions raised in and necessary to the decision. *See, e.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). In other words, the principle of *Maxwell* is not confined to taxes formalistically defined as being on state "privileges," but rather extends to validate income taxes imposed on nonresidents' in-state earnings at a rate determined by their total income.

Embarrassed by *Wheeler*'s ready application to their case, petitioners mention it only in a footnote (Petition, p. 19 n. 13) and deal with it only obliquely, by noting that it was decided before certain decisions of this Court that, according to petitioners (Petition, pp. 16-17), repudiate *Maxwell* (*Wheeler* is never mentioned in this context) by rejecting "formalistic analysis of the state tax" in question in favor of

examining the "economic realities and the practical effects of the tax." Though it is true that this Court's recent decisions pay heed to the "economic realities" of modern commerce, *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 295-96 (1987), this fact offers no comfort to petitioners. Doing as plaintiffs urge and ignoring a taxpayer's extensive income beyond what is taxable in a given state hardly strikes a blow for economic realism. Indeed, as noted in an article repeatedly cited with approval by petitioners, the chief justification for the approach to taxation upheld in *Wheeler* and now at issue once again lies not in the empty formalism of territoriality but rather in the real-world determination, bearing "no necessary relationship to political boundaries," that "a taxpayer shall shoulder a proportionately greater tax burden as his income rises." W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Michigan L. Rev. 1309, 1323 (1974).

Even on its own terms, moreover, plaintiffs' argument that this Court's recent due process and commerce clause jurisprudence somehow embodies a repudiation of the principles that controlled *Maxwell* and *Wheeler* is demonstrably erroneous. Prior to the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), on which plaintiffs rely, it was the law that a tax on a local privilege could not be applied to an activity that is part of interstate commerce. *Complete Auto Transit*, concluding that this approach ignored economic realities, overturned this *per se* rule, while finding nothing wrong with characterization of doing business either in a state or interstate commerce as a "privilege," 430 U.S. at 287. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), is to the same effect, scrutinizing a state tax on interstate commerce for its discriminatory

effect in lieu of a blanket holding that states may tax only local, intrastate privilege without violating the Commerce Clause. And in *American Trucking Associations*, the Court took pains to note that, in view of the "economic realities" of modern commerce, "interstate commerce as such has no immunity from State taxation." 483 U.S. at 295-6.[5] The common thread of these cases is this Court's willingness to find a tax on the privilege of doing business in a state compatible with the Commerce Clause even when the business being done is actually interstate commerce. Nothing in these cases indicates that, as petitioners suggest (Petition, p. 16), *Maxwell* and *Wheeler* are "no longer good law."

Thus, the line of precedent stretching from *Maxwell* through *Wheeler* and beyond to the present case is uninterrupted by any shift in this Court's perspective.[6] Petitioners finally attempt (Petition, pp. 13-14) to persuade this Court to review the decision below by suggesting that New York's calculation of its tax rate on the basis of the joint income of nonresident spouses who file joint federal returns, even when one spouse has no New York income, is a practice

[5]Petitioners also cite *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981), which dealt with the extent to which a state may impose conditions upon a privilege without offending the equal protection clause and did not address due process concerns at all.

[6]Two recent additional cases address the same issues resolved in *Wheeler* with the same result. *See*, *United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987) (no due process violation in calculating state tax on basis of nonresident military income, for "[t]he income in the taxing state is merely being taxed at an increased rate pursuant to a progressive system of taxation premised on the individual's ability to pay"); *Aronov v. Secretary of Revenue*, 323 N.C. 132, 371 S.E.2d 468 (1988) (rejecting due process challenge to state statute requiring nonresident taxpayer to reduce his distributive share of a North Carolina partnership's net operating loss by his out-of-state income).

deserving special constitutional scrutiny. In *Stevens v. Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 498 U.S. 819 (1990), the Supreme Court of Maine upheld that State's policy of determining its state income tax rate for nonresident married couples on the basis of their total income and calcualting the actual tax paid by apportionment. The Court relied on *Maxwell* and *Wheeler* to conclude that Maine's taxation of married nonresidents "does not deprive them of their property without due process." 571 A.2d at 1196. Although this case was the first to deal with nonresident income tax calculated on the basis of joint marital income, this Court saw no reason to grant certiorari. There is likewise no reason for it to do so now, only three years later.

Nor is there anything constitutionally suspect, beyond what is plainly resolved by *Maxwell* and *Wheeler*, about New York's approach to the New York income of a spouse who has filed a joint federal tax return. It is true, as petitioners note (Petition, p. 13), that "[t]he filing of a joint federal tax return does not convert the separate incomes of each spouse into joint property of both." But this is irrelevant, for New York is not asserting any sort of power over the property, joint, separate or otherwise, of a nonresident spouse with no New York income. Rather, it is asserting only its power to consider total marital income in calculating the tax rate for individuals whose filing of a joint federal return indicates their willingness to be considered with their spouses as a single unit for tax purposes. As this Court's refusal to review the decision in *Stevens* suggests, the income of a nonresident spouse without New York income is, for purposes of calculating and apportioning New York income, constitutionally indistinguishable from the non-New York income of the nonresident spouse with New York earnings. When a married couple files a joint federal return,

their joint income is a valid index of the rate of tax to be imposed on the New York earnings of the one member of the couple with New York income. If, as *Maxwell* and *Wheeler* indicate, taxation of a nonresident's New York income at a rate determined in part by out-of-state income is not in effect a tax imposed extraterritorially and in violation of due process, then this principle applies with equal force, and without necessity of further scrutiny by this Court, to married nonresidents filing a joint federal return when only one member of the couple has New York income.[7]

The central constitutional question posed by petitioners is thus far from "unresolved." Rather, it is and for decades has been well settled that, as this Court said in 1919, "[w]hen the State levies taxes within its authority, property to itself taxable by the State may be used as a measure of the tax imposed" without violating the due process clause. *Maxwell*, 250 U.S. at 539. There is no reason for this Court to grant the petition merely to reconsider this principle.

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[7]Contrary to petitioners' suggestion (Petition, p. 13), this conclusion is unaffected by the state court's invalidation on due process grounds of the joint filing requirement. Even without this requirement, the State can obtain the necessary information regarding a couple's joint income simply by compelling the nonresident spouse with New York income to disclose the information from his and his spouse's federal joint return on his separate New York tax return. Federal law itself, which permits inspection of federal returns by any state agency "which is charged under the laws of such State with responsibility for the administration of State tax laws," Internal Revenue Code § 6103(d)(1), contemplates this possibility. Obtaining information contained in their joint federal return from the spouse with New York income about the other spouse's income is not an assertion of "jurisdiction" over the latter and does not implicate due process.

II.

There is no conflict between the decision below and prior decisions of this Court involving the Article IV privileges and immunities clause.

Far from conflicting with the constitutional guarantee that the "citizens of each state shall be entitled to all the Privileges and Immunities of Citizens of the several states," U.S. Const. Art. IV, § 2, New York's approach to taxing nonresidents comports with established law in this area. The privileges and immunities clause bars "disparity of treatment" between residents and nonresidents. *Toomer v. Witsell*, 334 U.S. 385, 396 (1947). If, as in the present case, there is no such disparity, then the constitutional guarantee is not implicated.

Petitioners contend (Petition, pp. 20-21) that unconstitutional discrimination can be found in the fact that New York's taxing methodology "has the net effect of reducing the value to nonresidents of exemptions and deductions, the full value of which is available to residents." At the most obvious level, this is false: on their New York tax returns, plaintiffs are credited with exactly the same deductions and exemptions as nonresidents. What evidently troubles petitioners is that, because they are taxed by first calculating their tax "as if" they were residents and then reducing it by apportionment, the deductions and exemptions lose the dollar-for-dollar status they have for residents, for whom there is no apportionment. But apportionment also works to reduce the income on the basis of which a nonresident's tax is calculated. The end result is the same: residents and nonresidents alike are taxed at a rate that reflects their total income from all sources, reduced by the full amount of the

applicable exemptions and deductions. The amount of tax on nonresidents only will be further reduced to the extent they have out-of-state income. There is no discrimination or disparity of treatment here and thus no violation of the privileges and immunities clause.

That this Court subscribes to this unexceptionable conclusion is demonstrated by *Lung v. O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed for want of a substantial federal question*, 405 U.S. 961 (1981). The issue in *Lung* was the same as in the present case: Whether a state's apportionment procedure for nonresident income tax, whereby deductions and exemptions are allowed only in the same proportion that a nonresident's in-state income bears to his total income, discriminates against nonresidents under the privileges and immunities clause. The state court found that it did not, and this Court's dismissal of the appeal for want of a substantial federal question was tantamount to an affirmance on the merits. *See also*, *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *affirmed by an equally divided Court*, 471 U.S. 82 (1985) (upholding state-court decision that invalidated State's complete disallowance to nonresidents of certain deductions available to residents, but made clear that apportionment of deductions is constitutionally permissible). Nothing has occurred since 1981 to warrant reexamination of this conclusion.[8]

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[8]Petitioners also assert (Petition, p. 21) that the New York taxing scheme discriminates against nonresidents "in that it permits a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a resident who is married to a nonresident." While that statement is untrue, this issue is in any case irrelevant, for it was not raised by petitioners in the Court of Appeals or addressed by that court, and thus will not be reviewed by this Court on certiorari. *See*, *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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